LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
NOV 19 1957
JOHN T. FEY, Clerk

No. 558

In the Supreme Court of the United States

OCTOBER TERM, 1957

SOUTHERN RAILWAY COMPANY, CAROLINA AND NORTHWESTERN RAILWAY COMPANY, AND STATE UNIVERSITY RAILROAD COMPANY, APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

MOTION TO AFFIRM

J. LEE RANKIN,
Solicitor General,
VICTOR R. HANSEN,
Assistant Attorney General,
Department of Justice, Washington 25, D. C.

ROBERT W. GINNANE,
General Counsel,
B. FRANKLIN TAYLOR, Jr.,
Assistant General Counsel,
Interstate Commerce Commission, Washington 25, D. C.

INDEX

	Page
Questions presented	2
Statement	2
The factual situation	4
Argument	7
Conclusion	18

CITATIONS

Cases:

Auburn Mills v. *Chicago & A. R. Co.*, 222 I. C. C. 495 — 16

Board of Trade v. *United States*, 314 U. S. 534 — 10, 16

Carolina Coal Consumers Conference v. *A. & R. R. Co.*, 270 I. C. C. 291 — 4, 6

Denver & Rio Grande W. R. Co. v. *United States*, 351 U. S. 321 — 8, 9, 10

Great Northern Ry. Co. v. *United States*, 81 F. Supp. 921, affirmed, 336 U. S. 933 — 8, 13–14

St. Louis Southwestern Ry. Co. v. *United States*, 245 U. S. 136 — 10, 16

Sheridan Chamber of Commerce v. *C., B. & Q. R. R. Co.*, 26 I. C. C. 638, and 28 I. C. C. 250 — 16

Skinner & Eddy Corp. v. *United States*, 249 U. S. 557 — 16

Thompson v. *United States*, 343 U. S. 549 — 8, 9, 10, 14

United States v. *Great Northern Ry Co.*, 343 U. S. 562 — 11–12, 13

Virginian Ry. Co. v. *United States*, 272 U. S. 658 — 8, 13, 16, 17

Statute and rule:

Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 1, *et seq.*:

Section 1 (4) — 3, 13, 14

Section 15 — 3

Section 15 (4) — 3–4, 8, 13

Section 15 (7) — 5

Section 15a (2) — 17

Revised Rules of the Supreme Court of the United States, Rule 16 — 1

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 558

SOUTHERN RAILWAY COMPANY, CAROLINA AND NORTHWESTERN RAILWAY COMPANY, AND STATE UNIVERSITY RAILROAD COMPANY, APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1 (c) of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission, appellees, move that the judgment of the district court be affirmed.

This is a direct appeal from a final judgment dated July 5 and entered July 8, 1956, by a three-judge district court convened under 28 U. S. C. 2284 and 2325, dismissing appellants'[1] complaint seeking to

[1] Appellants are the Southern Railway Company and its connecting lines, the Carolina and Northwestern Railway Company and the State University Railroad Company, together sometimes referred to herein as Southern.

set aside an order of the Interstate Commerce Commission. The jurisdictional statement was served on appellees on October 18, 1957.

QUESTIONS PRESENTED

1. Whether the Commission properly found that the routes in question embracing as an intermediate carrier either the Carolina, Clinchfield and Ohio Railway or the Georgia Railroad are existing through routes.

2. Whether the Commission properly found that the assailed joint rates on fine coal in carloads over the routes in question embracing as an intermediate carrier either the Carolina, Clinchfield and Ohio Railway or the Georgia Railroad are unjust and unreasonable to the extent that they exceed the lower joint rates on fine coal in carloads contemporaneously applicable over other through routes from and to the same points.

STATEMENT

By complaint filed with the Commission on August 29, 1955, the complaining railroads (intervening defendants in the court below) alleged that appellants failed in their duty to join in the maintenance of reasonable through rates on fine coal, in carloads, from mines on the Louisville and Nashville Railroad Company, the Interstate Railroad Company, and the Norfolk and Western Railway Company in eastern Kentucky, eastern Tennessee, and southwestern Virginia, to destinations in North and South Carolina on the lines of appellants over routes embracing as an intermediate carrier either the Carolina, Clinch-

field and Ohio Railway or the Georgia Railroad, in violation of Section 1 (4) of the Interstate Commerce Act (49 U. S. C. 1 (4)). Various shippers intervened in support of the complaint.

On November 15, 1956, after hearing, the Commission issued its report (299 I. C. C. 335), holding that the routes in question embracing the Clinchfield or the Georgia Railroad are existing through routes within the meaning of Section 15 of the Act (49 U. S. C. 15), and that the higher rates on fine coal[2] applicable over those routes are and will be unjust and unreasonable to the extent that they exceed joint carload rates on fine coal contemporaneously available over other through routes, from and to the same points, in which appellants participate as delivering carriers. Accordingly, the Commission ordered appellants to join in joint carload rates on fine coal from the origins to the destinations involved over the routes via the Clinchfield or Georgia Railroad which shall not exceed the lowest joint carload rates on fine coal contemporaneously in effect over any route from and to the same points.

The three-judge district court unanimously sustained the Commission. The court concluded that the routes in question were through routes over which the Commission could compel a reduction in joint rates without reference to the requirements of Section 15

[2] Fine coal is defined as coal which will pass through a bar screen not exceeding 2½ inches between bars, or its equivalent, a 3-inch mesh or 3-inch round perforation, and is commonly described as stoker, slack, steam nut, pea, or nut and slack coal (299 I. C. C. 335; Ex. 4).

(4) of the Act, and that the Commission's action was abundantly justified by the evidence and its findings.

THE FACTUAL SITUATION

The origin mines in this case are the Harlan, Windrock, La Follette, and Jellico-Middlesboro groups in Kentucky and Tennessee on the Louisville and Nashville Railroad, mines in Virginia on the Interstate Railroad, and the Clinch Valley group 2 mines in Virginia on the Norfolk and Western Railway (299 I. C. C. at 336; Exs. 8 and 9). The destinations are points in North and South Carolina served by the Southern Railway and its connecting lines.

Prior to April 8, 1954, the same level of joint carload rates on all sizes of coal, including fine coal, applied over all routes from the origin mines to the North and South Carolina destinations, reflecting the level prescribed by the Commission in 1948 in *Carolina Coal Consumers Conference* v. *A. & R. R. Co.*, 270 I. C. C. 291, from all origin groups from which coal is shipped to North and South Carolina (299 I. C. C. at 336–337; Tr. 94). These routes are set forth in the following table:

I. From mines on the Louisville and Nashville

A. HARLAN FIELD

Route (1)	*Route (2)*
L. & N. to Dorchester Junction, Va.; *Interstate* to Miller Yard, Va.; *Clinchfield* to Marion, N. C., or Spartanburg, S. C.; *Southern* beyond.	*L. & N.* to Knoxville; *Southern* beyond.

B. HARLAN, WINDROCK, LA FOLLETTE, AND JELLICO-MIDDLESBORO FIELDS

Route (1)	*Route (2)*
L. & N. to Atlanta; *Georgia Railroad* to Augusta; *Southern* beyond.	*L. & N.* to Knoxville; *Southern* beyond. *L. & N* to Atlanta; *Southern* beyond.

II. From mines on the Interstate

Route (1)	*Route (2)*
Interstate to Miller Yard, Va.; *Clinchfield* to Marion, N. C., or Spartanburg, S. C.; *Southern* beyond.	*Interstate* to Appalachia, Va.; *Southern* beyond.

III. From mines on the Norfolk and Western (Clinch Valley group 2)

Route (1)	*Route (2)*
N. & W. to St. Paul, Va.; *Clinchfield* to Marion, N. C., or Spartanburg, S. C.; *Southern* beyond.	*N. & W.* to Norton, Va.; *Interstate* to Appalachia, Va.; *Southern* beyond.

In order to meet severe competition from other fuels, notably natural gas and oil, all of the railroads which participate in the movement of coal from mines in eastern Kentucky, eastern Tennessee, Virginia, and West Virginia proposed a voluntary reduction of 35 cents per ton in the rate on fine coal (299 I. C. C. 337–338; Tr. 94–95; Answer to Complaint filed with Commission, par. II). While in accord with the reduction, appellants, through routing restrictions, limited their participation to routes over which they received their longest hauls, and declined to participate in the reduced rates on fine coal moving from mines on the Louisville and Nashville, the Interstate, and the Norfolk and Western over routes which included the Clinchfield or the Georgia Railroad (299 I. C. C. at 338; Tr. 99; Ex. 5; Answer to Complaint filed with Commission, par. II). The urgency of the blanket reduction and the necessity of maintaining rates from mines on the Louisville and Nashville, the Interstate, and the Norfolk and Western in their proper relationship to rates from other origin groups included in the adjustment influenced the complaining carriers to forego requesting the Commission to suspend, under Section 15 (7), the schedules published to effect the

reduction, and they became effective on April 8, 1954 (299 I. C. C. at 338; Tr. 94–95).

The higher joint commodity rates in existence prior to the reduction continued in effect on all sizes of coal, including fine coal, over the routes denied the reduction by appellants' routing restrictions (column (1) in the above table), and on all sizes of coal except fine coal over the routes taking the reduced fine coal rate (column (2) in the above table) (299 I. C. C. at 336–337; Tr. 95–96).

In the *Carolina Coal Consumers* case, 270 I. C. C. 291, 318–319, the Commission had continued rate differentials and relationships previously prescribed for the various coal producing groups, and they were embodied in the joint rates there prescribed. While these differentials were continued in general by the blanket reduction in fine coal rates, since the reductions were 35 cents per ton from the prevailing rates, they were disrupted by appellants' routing restrictions. For example, rates on fine coal from mines in the Big Sandy group on the lines of the Chesapeake and Ohio Railway were on the same basis as the rates from the Harlan group prior to April 8, 1954. *Id.* at 294. Since that date, appellants participate in the reduced fine coal rates from the Big Sandy group over the Chesapeake and Ohio to Elkhorn City, Ky., thence the Clinchfield through Miller Yard to Marion or Spartanburg, and the Southern beyond (299 I. C. C. at 339; Tr. 113; Ex. 13). However, fine coal moving from the Harlan group over the Louisville and Nashville and the Interstate to Miller Yard, the Clinchfield to Marion or Spartanburg, and the South-

ern beyond is subject to the higher joint rates, which are 35 cents per ton higher than those from the Big Sandy group (299 I. C. C. at 339; Tr. 112–113).

It is undisputed that the routes denied the reduced rates were open, active routes over which fine coal, as well as other sizes of coal, had moved for many years (Exs. 20, 34). However, because of the differential of 35 cents per ton prevailing after April 8, 1954, only a few shipments of fine coal moved over the higher rated routes, and they appear to have been the result of shipper error (299 I. C. C. at 337; Tr. 146–147; Ex. 20).

Comparisons of the relative distances embraced by the routes taking the reduced fine coal rate and the routes denied it show that the latter are uniformly shorter with the result that car mile revenues would be higher over them (299 I. C. C. at 338; Exs. 10, 11, 12, 16, 17, 18). For example, with respect to the routes from the mines on the Interstate Railroad, diagrammed at page 11 of the Jurisdictional Statement as representative, the route via the Interstate to Miller Yard, thence the Clinchfield to Spartanburg and the Southern beyond, denied the reduction, is six miles shorter than the routes via the Interstate to Appalachia thence Southern, which takes the reduced rate; and the comparable routes to Marion, North Carolina, thence to North Carolina destinations are 37 miles shorter via the Clinchfield.

ARGUMENT

1. Appellants' principal contention before the Commission (299 I. C. C. at 337), in the court below (J. St. 4a–5a), and here (J. St. 3–6, 10–25), is that

the institution on April 8, 1954, of reduced rates on fine coal, restricted so as not to apply over the routes including the Clinchfield or the Georgia Railroad, closed the routes and extinguished them as through routes. Thus, appellants argue, the Commission must establish the routes as through routes in compliance with Section 15 (4) of the Act (49 U. S. C. 15 (4)) before it may prescribe just and reasonable rates.

Appellants' position is simply that long established, active through routes have been eliminated solely by virtue of the fact that lower rates instituted over competing routes have diverted traffic to the lower rated routes. To support their thesis, appellants point to the "holding out" and "course of business" language in *Thompson* v. *United States,* 343 U. S. 549, and *Denver & Rio Grande W. R. Co.* v. *United States,* 351 U. S. 321, and contend that the situation here fails to meet those tests.

It should be noted at the outset that the mere fact that traffic is prevented from moving over a route because the rates over the route are too high to make it competitive does not, standing by itself, negate its existence as a through route. *Virginian Ry. Co.* v. *United States,* 272 U. S. 658. Compare *Great Northern Ry. Co.* v. *United States,* 81 F. Supp. 921 (D. Del.), affirmed, 336 U. S. 933, holding that a through route existed even though the absence of a transit point for grain had effectively denied its use to shippers.

As this Court has made clear, the question of whether through routes exist is in each case one of

fact. *Denver & Rio Grande W. R. Co. v. United States, supra*, p. 327. It is equally clear that the facts in the *Thompson* and *Denver & Rio Grande* cases are entirely dissimilar from the factual situation which confronted the Commission and the lower court here.

The *Thompson* case involved the question of whether a through route existed from Lenora, Kansas, to Omaha, Nebraska, via the Missouri Pacific from Lenora to Concordia, Kansas, and the Burlington from Concordia to Omaha. In holding that the Commission's determination that the through route existed was without evidentiary support, the Court repeatedly stated that there was no evidence that any transportation service was ever offered, or that any shipment was ever made, from Lenora to Omaha via the Missouri Pacific and the Burlington. 343 U. S. at 551, 557, 560–561. Moreover, joint rates were not in existence between the points involved.

In the *Denver & Rio Grande* case, the Commission found that through routes via the Union Pacific and the Denver & Rio Grande through the Ogden Gateway did not exist. 287 I. C. C. 611, 619. But there joint rates had not existed for years, having been cancelled by published tariffs between 1906 and 1912 (351 U. S. at 328), and the Union Pacific's whole course of conduct had been to guard jealously its long haul and not open the routes via the Rio Grande (*id.* at 330). Nevertheless, the Court merely refused to disturb the Commission's finding, saying (*id.* at 328):

> * * * Whether the evidence could have justified the Commission in finding the existence

in the above-entitled case,[1] move that the judgment below be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

In support of this motion these appellees respectfully present the following:

II.

BRIEF IN SUPPORT OF THE MOTION.

Opening Statement.

This case is an attack by appellants on the report and order of the Interstate Commerce Commission (Division 2) entered November 15, 1956, wherein the Commission made the following ultimate finding:

> "We find that the assailed rates on fine coal, in carloads, from and to the points under consideration herein, over the described through routes embracing the Clinchfield or the Georgia Railroad as intermediate carriers, are and for the future will be unjust and unreasonable to the extent that they exceed or may exceed the joint carload rates on fine coal contemporaneously applicable over other through routes, from and to the same points, in which the defendants participate as delivering carriers. An appropriate order will be entered."[2]

---

[1] Intervening defendants below, as of right, under 62 Stat. 970, 63 Stat. 105; 28 U. S. C. § 2323. These appellees received appellants' Jurisdictional Statement on October 19, 1957.

[2] *Carolina, Clinchfield and Ohio Railway, et al.* v. *Southern Railway Company, et al.*, 299 I. C. C. 335, 340 (1956). Appellants' petition for reconsideration of such report and order was denied by order of the entire Commission entered March 18, 1957. By a subsequent order of the Commission the effective date of Division 2's order was stayed until June 6, 1957.

The Court below, by order entered July 5, 1957, dismissed appellants' complaint seeking to set aside the Commission's order.[3]

The lack of substantiality of the questions raised by appellants' Jurisdictional Statement will be clearly seen against the factual background of the development of the case.

In 1948 the Commission, upon complaints filed with it by certain coal shipping interests, prescribed the same level of freight rates on all sizes of coal from all groups of mines[4] in eastern Kentucky, eastern Tennessee, West Virginia and Virginia to North Carolina and South Carolina. The rates so prescribed were based upon a mileage scale. The actual rates to be applied from the base groups to key destinations were set forth in the Commission's report.[5] The Commission also approved in that case the rate differentials obtaining between the various groups of mines, which rate relationships had

---

[3] *Southern Railway Company, et al.* v. *United States of America, et al.*, 153 F. Supp. 57 (W.D. N.C., 1957). The same three-judge court had denied theretofore, by order entered May 10, 1957, appellants' motion for a temporary restraining order seeking to stay the effective date of the Commission's order until the Court below rendered its final order in the case.

[4] For freight rate-making purposes, coal mines are generally grouped so as to afford the same rate from all mines within a group even though there may be some variation in distances. Thus this Court explained, in *Ayrshire Corp.* v. *United States*, 335 U. S. 573, 576 (1949):

> "Group rates have been established by the carriers so that all mines within each producing area are accorded the same rates to the same consuming destinations."

[5] *Carolina Coal Consumers Conference* v. *A. & R. R. Co.*, 270 I. C. C. 291 (1948). Please see pp. 318-319 and Appendix I to that report.

existed for some forty years.[6] Such rates, plus subsequently authorized general freight rate increases, were published as joint rates in the freight tariffs and applied on all sizes of coal over existing through routes until April 8, 1954.[7]

On April 8, 1954, all the railroads which participate in the handling of coal from these groups of mines to all destinations in the Carolinas reduced by 35 cents per ton the rates on fine coal[8] for the purpose of meeting, to the extent possible, the severe competition then being encountered by fine coal from other energy-producing fuels such as natural gas and oil.[9] This was a general rate reduction agreed upon by all carriers which participated in the handling of fine coal.[1]

Appellants, however, while in full accord with such rate reductions, declined to participate in the reduced basis from the mines in the Harlan, Windrock, La Follette and Jellico-Middlesboro groups on the Louisville and Nashville Railroad in eastern Kentucky and eastern Tennessee, from the group of mines on the Interstate Railroad in southwestern Virginia, and from the Clinch Valley No. 2 group of mines on the Norfolk and Western Railway in southwestern Virginia, to points in the Carolinas on appellants' rail lines, *over*

---

[6] *Ibid.* Please see also *Bituminous Coal Rates to the Southeast*, 37 I. C. C. 652 (1915); *Coal from Virginia, Kentucky and Tennessee to Southeast*, 229 I. C. C. 731 (1938); Tr. 106.

[7] Tr. 94, 104.

[8] Fine coal, by tariff designation, is coal which will pass through a bar screen not exceeding 2½ inches between bars, or its equivalent, a 3-inch perforation. Ex. 4 (Tr. 95, 215).

[9] Tr. 94, 95.

[1] Tr. 94.

routes which included either the Clinchfield Railroad or the Georgia Railroad as an intermediate carrier.[2] These two railroads, the Clinchfield Railroad (commonly referred to, and referred to hereinafter, as the Clinchfield) and the Georgia Railroad, are operated by appellees, Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company, as joint lessees of the properties.[3]

Instead, appellants limited their concurrence in the rate reductions to those routes, competitive with the Clinchfield or Georgia Railroad routes, which afforded appellants their long haul on the traffic.[4]

The routes involved are as follows, those in Column A being routes over which the reduction was not made effective and those in Column B being routes over which the reduction was made effective:

---

[2]Tr. 97, 98, 99, 118, 240, 241, 242, Ex. 5 (Tr. 96, 215), Ex. 7 (Tr. 97, 215), Ex. 8 (Tr. 98, 215).

[3]Tr. 9, 10, 12, 13.

[4]Tr. 97, 98, 99, 104, 119, 240, 241, 242, Ex. 8 (Tr. 98, 215).

A. Routes Over Which Reduction Was Not Made Effective.	B. Routes Over Which Reduction Was Made Effective.
1. From Harlan Group.	
Louisville and Nashville to Dorchester Junction, Va.; *Interstate* to Miller Yard, Va.; *Clinchfield* to Marion, N. C., or Spartanburg, S. C.; *Southern* beyond.	*Louisville and Nashville* to Knoxville, Tenn.; *Southern* beyond.
2. From Interstate Group.	
Interstate to Miller Yard, Va.; *Clinchfield* to Marion, N. C., or Spartanburg, S. C.; *Southern* beyond.	*Interstate* to Appalachia, Va.; *Southern* beyond.
3. From Clinch Valley No. 2 Group.	
Norfolk & Western to St. Paul; *Clinchfield* to Marion, N. C., or Spartanburg, S. C.; *Southern* beyond.	*Norfolk & Western* to Norton, Va.; *Interstate* to Appalachia, Va.; *Southern* beyond.
4. From Harlan, Jellico-Middlesboro, LaFollette and Windrock Groups.	
Louisville and Nashville to Atlanta, Ga.; *Georgia Railroad* to Augusta, Ga.; *Southern* beyond.	*Louisville and Nashville* to Knoxville, Tenn., or Atlanta, Ga.; *Southern* beyond.

Thus, after April 8, 1954, a lower rate applied on fine coal from a given mine group over the route or routes shown in Column B than over the route shown in Column A, although before that time the same rates, published in the freight tariff as joint rates, applied

on all sizes of coal, including fine coal, over the through tariff routes shown in both Columns A and B.

Schematic diagrams of these routes are set forth in Appendix A.

The schedules effecting the fine coal rate reductions on April 8, 1954, did not cancel the joint rates on all sizes of coal, including fine coal, nor did they cancel the through Clinchfield or Georgia Railroad routes. Those rates and routes remained unchanged. The reduced rates on fine coal simply were made to apply only over appellants' long-haul routes and not over the Clinchfield or Georgia Railroad routes. The result of appellants' limited concurrence was to effect a diversion of fine coal traffic, except for a few shipments made by mistake, to their lines and away from the Clinchfield and the Georgia Railroad routes[5] and to destroy the long-established rate relationships over the involved routes and between the various origin groups.[6]

The Clinchfield and the Georgia Railroad routes are of long standing and have been actively used. During January and February of 1954, to illustrate, 366 cars of coal, including a substantial volume of fine coal, moved over the routes of the Clinchfield from Harlan, Interstate and Clinch Valley No. 2 group mines to points on the Southern Railway in North Carolina and South Carolina.[7] Subsequent to April 8, 1954, a substantial volume of coal, other than fine coal, continued to move over such routes.[7] During four months of 1952 approximately 45 percent of all coal which moved

[5]Ex. 20 (Tr. 122, 215), Tr. 146.
[6]Tr. 106.
[7]Ex. 20 (Tr. 122, 215).

to North Carolina and South Carolina from the Harlan group was routed in connection with the Clinchfield Railroad.[8] Nothing of record remotely suggests that these routes are or have been unused or impracticable for the movement of coal, including fine coal, within the territory here involved.

In all instances the distances via the Clinchfield routes are substantially shorter than the distances via appellants' long-haul routes.[9] Consequently, on equal rates over the several routes the car-mile and ton-mile earnings of the carriers are substantially greater over the Clinchfield routes than over the appellants' long-haul routes.[1]

Those routes via the Georgia Railroad also are shorter than appellants' long-haul routes via Atlanta, thereby producing greater car-mile and ton-mile earnings on equal rates for the carriers over the Georgia Railroad route.[2]

The need for the rate reductions on fine coal to meet competition from other fuels was so urgent and was of such importance to the involved railroads and their shippers alike that these appellees, and others, were foreclosed, as a practical matter, from seeking suspension of the schedules publishing the rate reductions and routing restrictions;[3] consequently, the schedules went into effect.

---

[8]This percentage includes coal destined to points not served by appellants. Ex. 34 (Tr. 237, 265).

[9]Ex. 12 (Tr. 112, 215).

[1]Ex. 10 (Tr. 110, 215), Ex. 11 (Tr. 111, 215).

[2]Tr. 121, 122, Ex. 17 (Tr. 119, 215), Ex. 18 (Tr. 121, 215).

[3]Tr. 149, 150.

Thereafter, the aggrieved railroads filed their complaint with the Commission, which resulted in the report and order here under attack, charging in the main that the joint rates then applicable over the assailed routes were then, and for the future would be, unjust and unreasonable to the extent that they exceeded the rates applicable over appellants' long-haul routes in violation of Section 1(4) of the Interstate Commerce Act (54 Stat. 900, 49 U.S.C. §1(4)).[4]

Statutes Involved.

The only statutory provisions pertinent to this case are Section 1(4) of the Interstate Commerce Act,[5] insofar as it relates to the duty of railroads to establish just and reasonable rates, and Section 15a(2) of the same Act.[6] These statutes are reproduced as Appendix B.

Summary of Argument.

The two numbered questions presented by appellants and the several subsidiary questions embraced therein are not substantial.

The findings by the Interstate Commerce Commission that the Clinchfield and the Georgia Railroad routes are existing through routes, and that the rates on fine coal over such routes were unjust and unreason-

---

[4]Complaint of these appellees, except Harlan County Coal Operators Association, before the Commission, Paragraph III, p. 4. Shippers, including Harlan County Coal Operators Association, intervened in support of the complainants (299 I. C. C. at p. 336).

[5]54 Stat. 900, 49 U. S. C. § 1(4).

[6]48 Stat. 220, 54 Stat. 912, 49 U. S. C. § 15a(2).

able to the extent that they exceeded the rates contemporaneously applicable on fine coal over appellants' long-haul routes, are determinations of issues of fact which are within the special competence of the Commission.

Such findings are abundantly supported by appropriate preliminary findings and by substantial evidence of record.

The Commission was not required by the pleadings, the evidence or the law to consider the provisions of Paragraphs (3) and (4) of Section 15 of the Interstate Commerce Act,[7] having first properly determined that the Clinchfield and the Georgia Railroad routes are existing through routes.

The Commission has correctly interpreted and applied the provisions of Sections 1(4) and 15a(2) of the Interstate Commerce Act.

Question 1 Presents No Substantial Question.

Appellants' Question 1 is whether the Commission committed fatal error in finding that the Clinchfield and the Georgia Railroad routes were existing through routes.

The existence of a through route is solely a question of fact, to be determined according to the principles enunciated by this Court in *Denver & R. G. W. R. Co.* v. *Union P. R. Co.*, 351 U. S. 321, 327 (1956), as follows:

". . . We said in *Thompson* v. *United States*, *supra*, at 557, that 'In short, the test of the exist-

[7] 54 Stat. 911, 49 U. S. C. § 15(3) and (4).

ence of a "through route" is whether the participating carriers hold themselves out as offering through transportation service.' Findings of through routes can therefore be made on the basis of express agreements between carriers or on the basis of inferences drawn from continuous practices sufficient to show that through routes exist even though not provided for in formal contracts or tariffs. The question in each case is one of fact. Cf. *Through Routes and Through Rates*, 12 I. C. C. 163, 166-167 . . . ."

The question being one of fact, the determination of it by the Commission is conclusive so long as it has a rational basis[8] or is supported by substantial evidence. The doctrine of administrative finality on the issue of the existence of a through route was recognized by this Court in the *Denver and Rio Grande* case, *supra*, at page 328:

". . . Whether the evidence could have justified the Commission in finding the existence of through routes we need not determine. We are satisfied, however, that the evidence before the Commission did not compel it to make such a finding and that its conclusion that the through routes claimed were not in existence is supported by substantial evidence."

Thus, the scope of review of this question should be limited to an examination of the record before the

[8]In *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286-287 (1934), this Court declared:

". . . The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body . . . ."

Commission to determine if the Commission could properly find, as it did,[9] that through routes are in existence via the Clinchfield and the Georgia Railroad. Upon the making of such a finding—and no contrary finding could properly have been made—the provisions of Section 15(3) and (4), which, so far as pertinent to this case, relate solely to the establishment of a through route, do not come into play. Thus, in *Thompson* v. *United States,* 343 U. S. 549, 556 (1952), this Court said:

> "If the Commission had correctly applied the term 'through route' in this case, the Commission's restricted power to 'establish' through routes under Section 15(3) and (4) is not relevant to this case."

In this case the Clinchfield and the Georgia Railroad routes are of long standing and have been actively used in the movement of all types of coal. There is no dispute of that fact.

There is also no dispute that joint rates on coal, including fine coal, were, before and after the reduction of the rates on fine coal, applicable over the Clinchfield and the Georgia Railroad routes.

The carriers at all times held themselves out in their published tariffs to transport fine coal at joint rates over the Clinchfield and the Georgia Railroad routes. Not only were they available through routes but in the case of the Clinchfield routes they were

[9] "It follows that the routes in question are through routes within the meaning of Section 15 of the Act" (299 I. C. C. at p. 337).

the shortest routes, and in the case of the Georgia Railroad routes they were shorter than appellants' routes through Atlanta.

There was simply an obstacle to the free movement of fine coal over such routes because of the higher rates maintained thereover by the action of appellants in seeking to force to their own lines all the traffic they could. As before mentioned, a few shipments of fine coal did move over the Clinchfield route after April 8, 1954. Although such shipments were made by mistake, the error was that of the shipper, who was penalized by having to pay the higher joint rate applying over the Clinchfield route. Nothing in the record remotely suggests that the shipper was billed at any thing other than the higher joint rate or that it was through inadvertence by the railroads that these shipments moved over the Clinchfield route.

Finally, appellants do not question that such routes were open for the movement of all other sizes of coal!

While the existence of a through route it not dependent upon the existence of a joint rate (*Thompson* v. *United States, supra,* 343 U. S. 549, 557), the existence of a joint rate presupposes the existence of a through route, for the words "joint rate" obviously mean the participation of more than one carrier in such a rate, and joint rates, as we have explained, continued in effect over the Clinchfield and the Georgia Railroad routes. It may indeed be said that the existence of a joint rate is conclusive of the existence of a through route. Thus, in *U. S.* v. *Great Northern R. Co.*, 343 U. S. 562, 574 (1951), this Court clearly stated:

". . . joint rates published by two or more carriers are by definition always applicable to a through route over the lines of those carriers . . ."

Consequently, the continued existence of the joint rates applicable over the Clinchfield and the Georgia Railroad routes standing alone establishes a "holding out" by the carriers, including appellants, to perform a through transportation service and is itself sufficient factual support for the Commission's finding. This, when coupled with the long and continuous history of these routes and the role they have always played in the movement of coal of all sizes, makes it too clear to be seriously challenged that the Commission's finding that the Clinchfield and the Georgia Railroad routes were existing through routes was reasonable and right and well supported by the record. In the circumstances no other finding indeed was permissible.

In *Virginian Ry.* v. *United States,* 272 U. S. 658, 666-667 (1926), this Court said, in circumstances quite similar to those present here but where joint rates were not in effect but only combinations of local rates:

"The Virginian contends that the order is void because the Commission directed the establishment of through routes and joint rates without finding that they are necessary in the public interest. Such a finding is essential to the validity of an order under Sec. 15(3). But the order here in question was not sought or made under Sec. 15(3) and does not direct the establishment of through routes and joint rates. Through routes to the West were already in existence. And there were through

rates by combination . . . (citing cases) . . . *The fact that the combination rates were excessive constituted the only obstacle to the movement.* The Chesapeake & Ohio did not oppose the reduction of its rates from the junction to the West. It was willing that these 54 mines on the Virginian should enjoy the rates already open to the other 45. The Virginian resisted a reduction of its local rate to the junction. The Commission found that the combination rate was both unreasonable and discriminatory. It prescribed through rates which it found were reasonable and nondiscriminatory. It did not order joint rates. And no question of divisions was before the Commission. The order was sought and made under Section 1 and Section 3. Section 15(3) does not require that the Commission must make a special finding of public interest, before it can prescribe how an existing through rate found to be unreasonable and discriminatory shall be made conformable to law." (Emphasis added)

Please see also *Great Northern Ry. Co.* v. *United States*, 81 F. Supp. 921 (D.C. D. Del., 1948), affirmed 336 U. S. 933, where it was held that a through route was in existence for the movement of grain although the absence of a transit point had effectively denied use of the route to shippers.

Thompson v. *United States, supra,* 343 U. S. 549, and *Denver & R. G. W. R. Co.* v. *Union Pacific R. Co., supra,* 351 U. S. 321, are relied upon by appellants (Ju. St. pp. 16-21) but are in no respect helpful to them.